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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

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9 UNITED STATES OF AMERICA, * * * Case No. 2:10-cr-00499-LRH-GWF-1
10 v. Respondent/ Plaintiff,
11 RANDY HAAS, ORDER
12 Petitioner/ Defendant.
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15 Before the court is petitioner Randy Haas' motion, with supplemental briefing as ordered
16 by the court, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. ECF Nos.
17 37, 39, 40, 41. The United States filed an opposition, (ECF No. 44), to which Haas replied, (ECF
18 No. 45). Subsequently, the Government filed a motion for leave to advise the court of relevant new
19 authority, *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018). ECF No. 47. Based on this
20 relevant new authority, Hass then filed a motion to stay his § 2255 motion pending the resolution
21 of the mandate or until the United States Supreme Court resolved the issue of *certiorari* in
22 *Blackstone*. ECF No. 48. The Government filed an opposition to the stay (ECF No. 49), to which
23 Haas replied (ECF No. 50).

24 Upon review of the pending motions, the Court denies Haas's motion to vacate his sentence
25 under § 2255, denies his motion to stay as moot, and denies the Government's motion for leave to
26 advise the court of *Blackstone* as moot, in light of the recent Supreme Court ruling in *United States*
27 *v. Davis*, 588 U.S. ___, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019).

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1 **I. BACKGROUND**

2 On September 29, 2010, Haas was indicted for (1) attempted interference with commerce
3 by robbery, under 18 U.S.C. § 1951 (“attempted Hobbs Act robbery”); (2) discharge of a firearm
4 during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and (3) felon in possession
5 of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), after he attempted to take
6 \$1,800.00 worth of 80-milligram OxyContin pills from “Mike,” a drug dealer, brandishing and
7 discharging a firearm in the process. ECF No. 1. On March 11, 2011, a plea agreement was reached
8 in which Haas agreed to plead guilty to Count II, discharging a firearm during a crime of violence,
9 in exchange for the Government dismissing Counts I and III. ECF No. 27. The same day, in open
10 court, Haas changed his plea and the court deferred accepting or rejecting the plea agreement until
11 sentencing. ECF No. 26. The court ultimately accepted the plea agreement and Haas was sentenced
12 on July 11, 2011, to 120-months custody, with credit for time served, and 3-years supervised
13 release with special conditions. ECF Nos. 33, 35.

14 On June 20, 2016, Haas filed an abridged motion to vacate, set aside, or correct sentence
15 under 28 U.S.C. § 2255, in light of the United States Supreme Court’s decision in *Johnson v.*
16 *United States*, 135 S. Ct. 2551 (2015) (“*Johnson*”). ECF No. 37. Haas then filed his full brief on
17 the issues on December 9, 2016. ECF No. 39.

18 On July 12, 2017, the court granted Haas the opportunity to file supplemental briefing on
19 whether attempted Hobbs Act robbery is a crime of violence and invited the Government to
20 respond. ECF No. 40. Haas provided said briefing, (ECF No. 41), to which the Government
21 responded (ECF No. 44), and Haas replied (ECF No. 45).

22 On October 3, 2018, the Government filed a motion for leave to advise the court of new
23 relevant legal authority, *Blackstone*, arguing that Haas’s claims are time barred under the new
24 precedent. ECF No. 47. In response, Haas filed a motion to stay his §2255 motion to vacate
25 pending resolution of *Blackstone*, either on rehearing *en banc* before the Ninth Circuit or resolution
26 of the issue of *certiorari*, whichever is later. ECF No. 48. Accordingly, the Government opposed
27 the stay (ECF No. 49), to which Haas replied (ECF No. 50). The court now rules on all pending
28 motions before the court.

1 **II. LEGAL STANDARD**

2 Pursuant to 28 U.S.C. § 2255, a petitioner may file a motion requesting the court which
3 imposed sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a motion
4 may be brought on the following grounds: (1) “the sentence was imposed in violation of the
5 Constitution or laws of the United States;” (2) “the court was without jurisdiction to impose such
6 sentence;” (3) “the sentence was in excess of the maximum authorized by law;” or (4) the sentence
7 “is otherwise subject to collateral attack.” *Id.*; *see United States v. Berry*, 624 F.3d 1031, 1038 (9th
8 Cir. 2010). When a petitioner seeks relief pursuant to a right newly recognized by a decision of
9 the United States Supreme Court, a one-year statute of limitations applies. 28 U.S.C.
10 § 2255(f). That one-year limitation period begins to run from “the date on which the right asserted
11 was initially recognized by the Supreme Court.” *Id.* § 2255(f)(3).

12 **III. DISCUSSION**

13 **A. Haas’s claim is not waived or procedurally barred.**

14 The Government argues that Haas waived his right to challenge his sentence because (1)
15 his plea agreement contains a collateral-attack waiver, and (2) he failed to raise the issue on direct
16 appeal. ECF No. 44 at 3. These arguments are unavailing. First, the Ninth Circuit has held that an
17 appeal waiver in the plea agreement does not bar a defendant’s challenge to his sentence based on
18 an unconstitutionally vague statute. *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016)
19 (“A waiver of appellate rights will also not apply if a defendant’s sentence is ‘illegal,’ which
20 includes a sentence that ‘violates the constitution.’”). As Haas argues that his sentence should be
21 vacated because it was based on the now unconstitutionally vague residual clause of § 924(c), his
22 motion is not barred by the plea agreement.

23 Second, Haas is not barred from collaterally attacking his sentence because he failed to do
24 so on direct appeal. Under § 2255(f)(3), Haas is entitled to challenge his sentence within one year
25 of “the date on which the right [he] assert[s] was *initially* recognized by the Supreme Court.”
26 (emphasis added). Courts in this District have previously held that a petition challenging the
27 constitutionality of § 924(c)’s residual clause brought within one year of *Johnson* was timely. *See*
28 *United States v. Bonaparte*, Case No. 2:12-cr-132-JAD-CWH-2, 2017 WL 3159984, at *2 (D.

1 Nev. July 25, 2017); *United States v. Harrison Johnson*, No. 2:12-cr-00336-JAD-CWH, 2018 WL
2 3518448, at *2 (D. Nev. July 19, 2018) (“*Harrison Johnson*”). As Haas’ initial motion was brought
3 within 1 year of *Johnson*, this court likewise finds it timely. However, the court need not rest its
4 decision on *Johnson* alone because the Supreme Court, in *United States v. Davis*, ruled that the
5 residual clause of § 924(c) is likewise unconstitutionally vague. 588 U.S., 139 S. Ct. 2319, 204
6 L. Ed. 2d 757 (2019). Therefore, Haas’ motion is timely.

7 **B. While the residual clause of § 924(c) is unconstitutionally vague, Haas’ sentence is
8 upheld under the “elements” clause of the statute.**

9 Haas plead guilty to Count II of the indictment, which charged him with violating 18 U.S.C.
10 § 924(c)(1)(A). This statute provides “any person, who, during and in relation to any crime of
11 violence . . . for which the person may be prosecuted in a court of the United States, uses or carries
12 a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the
13 punishment provided for such crime of violence . . . be sentenced to a term of imprisonment” of
14 not less than 10 years if the firearm is discharged. The statute further defines “crime of violence”
15 in two ways. The first, by what is known as the “elements” or “force” clause: “an offense that is a
16 felony and has as an element the use, attempted use, or threatened use of physical force against the
17 person or property of another.” *Id.* § 924(c)(3)(A). The second, by what is known as the residual
18 clause: an offense that is a felony and “that by its nature, involves substantial risk that physical
19 force against the person or property of another may be used in the course of committing the
20 offense.” *Id.* § 924(c)(3)(B). Haas argues that attempted Hobbs Act Robbery is not a crime of
21 violence by its elements, and thus his sentence under § 924(c) could only have arisen from the
22 unconstitutionally vague residual clause, and therefore, must be vacated. ECF Nos. 39; 41. The
23 court disagrees because attempted Hobbs Act robbery is a crime of violence.

24 This court faced the same issue last year in *Harrison Johnson*, 2018 WL 3518448, at *3
25 and again this year in *United States v. Romero-Lobato*, No. 3:18-cr-00049-LRH-CBC, 2019 U.S.
26 Dist. WL 2179633, at *3-4 (D. Nev. May 17, 2019) (implementing the same reasoning from
27 *Harrison Johnson*). In *Harrison Johnson*, Judge Jennifer A. Dorsey found that attempted Hobbs
28 Act robbery qualified as a crime of violence under the elements clause of § 924(c)(3)(A) when

1 applying the modified categorical approach. 2018 WL 3518448, at *4. Judge Dorsey concluded
2 that the Hobbs Act is divisible, meaning that she could apply the modified categorical approach
3 instead of the categorical approach to determine whether Hobbs Act robbery is a crime of violence.
4 *Id.* at *3 (citing *Descamps v. United States*, 570 U.S. 254, 257 (2013) (approving of the use of the
5 modified categorical approach in lieu of the categorical approach when the statute is divisible)).
6 For a statute to be divisible, it must contain multiple, alternative elements of functionally separate
7 crimes, not just be disjunctively worded. *United States v. Dixon*, 805 F.3d 1193, 1198 (9th Cir.
8 2015). The Hobbs Act robbery statute, 18 U.S.C. §1951(a), states that “[w]hoever in any way or
9 degree obstructs, delays, or affects commerce or the movement of any article or commodity in
10 commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens
11 physical violence to any person or property in furtherance of a plan or purpose to do anything in
12 violation of this section shall be fined under this title or imprisoned not more than twenty years,
13 or both.” Judge Dorsey found the statute to have six functionally separate crimes: (1) interference
14 with commerce by robbery; (2) interference with commerce by extortion; (3) attempt to interfere
15 with commerce by robbery; (4) attempt to interfere with commerce by extortion; (5) conspiracy to
16 interfere with commerce by robbery, and (6) conspiracy to interfere with commerce by extortion.
17 *Harrison Johnson*, 2018 WL 3518448, at *3. The Court agrees with this reading of §1951(a), and
18 also finds that the statute is divisible.

19 Because the statute is divisible, the court may apply the modified categorical approach to
20 the specific predicate offense under which Haas was charged – an attempt to interfere with
21 commerce by robbery – to determine if it qualifies as a crime of violence under §924(c)(3)(A). To
22 prove attempted Hobbs Act robbery, the government must show that (1) the defendant knowingly
23 attempted to obtain OxyContin from a victim; (2) the defendant attempted to do so by means of
24 robbery; (3) the defendant believed that the victim would part with the OxyContin because of the
25 robbery; (4) the robbery would have affected interstate commerce; and (5) the defendant took a
26 substantial step toward committing the crime. See 9th Cir. Model Jury Instruction 8.143A Hobbs
27 Act—Robbery or Attempted Robbery (Approved April 2019); *Harrison Johnson*, 2018 WL
28 3518448, at *4. From a plain reading of the elements of attempted Hobbs Act robbery, it is clear

1 that such offense “has as an element, the use, attempted use, or threatened use of force,” and
2 therefore, by its elements, attempted Hobbs Act robbery meets the definition of crime of violence.

3 The elements clause of §924(c)(3)(A) includes the words “attempted [or threatened] use
4 . . . of physical force against the person or property of another,” which, as the Eleventh Circuit
5 noted in *United States v. St. Hubert*, indicates Congress’s intent to include the attempted or
6 threatened use of physical force as a crime of violence. 909 F.3d 335, 352 (11th Cir. 2018).
7 Presumably, if Congress did not intend for attempt offenses to be classified as crimes of violence,
8 it would not have included such language in the statute. Further, in *Hill v. United States*, the
9 Seventh Circuit held that because a defendant must specifically intend to commit every element of
10 a crime to be guilty of the attempt version of that crime, “[w]hen the intent element of the attempt
11 offense includes intent to commit violence against the person of another . . . it makes sense to say
12 that the attempted crime itself includes violence as an element.” 877 F.3d 717, 719 (7th Cir. 2017).
13 This is precisely the case here. The court finds the reasonings of the Eleventh and Seventh circuits
14 to be persuasive and adopts their views herein.

15 A holding to the contrary would be illogical. Under Ninth Circuit precedent, proof of an
16 attempt requires that (1) the defendant specifically intended to commit the criminal offense, and
17 (2) that he took a substantial step towards doing so. *See U.S. v. Saavedra-Velazquez*, 578 F.3d
18 1103, 1107 (9th Cir. 2009). The step required must be of “such substantiality that, unless frustrated,
19 the crime would have occurred.” *Id.* (quotations omitted). In other words, but for some external
20 force beyond the defendant’s control, his crime would have been successful. In this context, a
21 defendant would attempt to commit the same act (robbery), but in one case he completes his
22 objective, and in another case, he is stopped by a factor beyond his control, such as police
23 intervention or resistance from the victim. The defendant who completes his robbery is considered
24 to have committed a crime of violence, but the defendant possessing the same intent and
25 performing the same actions but who fails does not commit a crime of violence. This scenario
26 results in disparate sentences for defendants who have the same intent and engage in the same
27 conduct, something that Congress has long strived to avoid.

1 Because Haas' conviction may be upheld under the elements clause of § 924(c), the
2 Supreme Court's decision in *Davis* does not affect Haas' sentence. While Haas was not convicted
3 of the predicate offense, he pled guilty and admitted to the elements of attempted Hobbs Act
4 robbery as part of his plea agreement: Haas admitted that (1) he went to the CVS parking lot on Ft
5 Apache Road and Desert Inn in Las Vegas, Nevada, to rob "Mike" the drug dealer of OxyContin
6 pills; (2) he brought a Rugger 9mm model gun, which during the attempted robbery he used to
7 discharge a "warning shot" at Mike; (3) the Government could prove that OxyContin pills would
8 have traveled in interstate commerce, and that trafficking of OxyContin pills would have affected
9 interstate commerce. *See* ECF No. 27 at 7-8. While the robbery was ultimately thwarted by the
10 intended victim, the admitted facts show that Haas took a substantial step toward committing the
11 robbery. *See id.* Accordingly, Haas's conviction and resulting 120-month sentence withstands his
12 constitutional challenge and is upheld under the elements clause of § 924(c). Haas' motion to
13 vacate, set aside, or correct his sentence is therefore denied.

14 **C. Certificate of Appealability**

15 To proceed with an appeal of this Order, Petitioner must receive a certificate of
16 appealability from the Court. 28 U.S.C. § 2253(c)(1); FED. R. APP. P. 22; 9th Cir. R. 22-1; *Allen v.*
17 *Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550,
18 551-52 (9th Cir. 2001). This means that Petitioner must make "a substantial showing of the denial
19 of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120
20 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). He bears the burden of demonstrating that the issues are
21 debatable among jurists of reason; that a court could resolve the issues differently; or that the
22 questions are adequate to deserve encouragement to proceed further. *Slack*, 529 U.S. at 483-84.

23 The Supreme Court's ruling in *Davis* occurred just a few months ago, and this case presents
24 an issue not yet decided by this Circuit. Therefore, the court shall grant Haas a certificate of
25 appealability.

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1 **IV. CONCLUSION**

2 IT IS THEREFORE ORDERED that Haas' motion to vacate, set aside, or correct sentence
3 pursuant to 28 U.S.C. § 2255 (ECF Nos. 37, 39) is **DENIED**.

4 IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED**.

5 IT IS FURTHER ORDERED that the Government's motion for leave to advise the court
6 of *Blackstone* (ECF No. 47) is **DENIED as moot**. Because section 924(c)'s residual clause is
7 unconstitutionally vague, a petitioner may challenge his or her sentence on a § 2255 motion.

8 IT IS FURTHER ORDERED that Haas' motion to stay his § 2255 motion (ECF No. 48) is
9 **DENIED as moot**. *See Blackstone*, 139, S. Ct. 2762 (2019) (denying the petition for *Writ of*
10 *Certiorari*).

11 IT IS FURTHER ORDERED that the Clerk of Court **ENTER** a separate and final
12 Judgment denying Haas' § 2255 motion. *See Kingsbury v. United States*, 900 F.3d 1147, 1150 (9th
13 Cir. 2018).

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15 IT IS SO ORDERED.

16 DATED this 1st day of October, 2019.

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19 LARRY R. HICKS
20 UNITED STATES DISTRICT JUDGE
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